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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MAXIMO TAMAYO-FLORES, Defendant and Appellant.	2d Crim. No. B261414 (Super. Ct. No. 2009037001) (Ventura County)

Maximo Tamayo-Flores appeals judgment after conviction by jury of first degree murder and second degree robbery of Ramon Quintero; making criminal threats to Sara Cruz and kidnapping her; evading an officer with willful disregard for safety; and being a felon in possession of a firearm. (Pen. Code, §§ 187, subd. (a), 211, 422, 207, subd. (a), former 12021, subd. (a)(1); Veh. Code, § 2800.2, subd. (a).)[1] The jury found true the special circumstance that he murdered Quintero

[1] All further statutory references are to the Penal Code unless otherwise stated.

while engaged in commission or attempted commission of a robbery. (§ 190.2, subd. (a)(17)(A).) It also found true allegations that he personally discharged a firearm causing great bodily injury or death in the crimes against Quintero (§ 12022.53, subd. (d)), and personally used a firearm in the crimes against Cruz (§§ 12022.5, subd. (a), 12022.53, subd. (b)). The trial court sentenced him to life without the possibility of parole, plus 25 years to life, for the murder with use of a firearm. It sentenced him to a consecutive aggregate determinate term of 22 years 8 months for the crimes against Cruz and evading the officer. It imposed but stayed upper term sentences for the robbery and the possession of a firearm, pursuant to section 654.

Tamayo-Flores contends the prosecutor discriminated against male jurors; there was insufficient evidence of robbery; his prior narcotics convictions were irrelevant and unduly prejudicial; the court unfairly limited his cross-examination of Cruz; the court should have given an accomplice instruction concerning Cruz; and the prosecutor committed misconduct in closing argument by overstating the evidence about "blood DNA," footprints, and tire prints. We affirm.

BACKGROUND

Cruz lived with Quintero, and considered him to be her husband. They both worked with Tamayo-Flores. One night after work, Quintero told Cruz to come with him and Tamayo-Flores to buy drugs. She did not want to go, but he insisted.

Quintero initially drove but Tamayo-Flores later assumed the driving position, while Quintero sat in the front passenger seat and Cruz rode in back. They stopped several times, looking for a black and gray car. They drove around for hours, until Tamayo-Flores said he was lost. He then drove them

to a "solitary" and "dark" place, pulled over, and shot Quintero in the head. Cruz screamed and Tamayo-Flores hit her in the chin with the gun. He told her to "shut up or he would kill [her]."

Tamayo-Flores got out of the truck, went around to the passenger side, unfastened Quintero's seatbelt and threw his body down a rock embankment. Cruz did not know where she was, but she could hear the ocean.

Tamayo-Flores told Cruz to get out of the truck, which she did. He told her to "give him the money." She said she had none and only Quintero "could have the money." He took her cell phone, then went down the rocks to Quintero's body. Cruz saw him bend over the body. He came back with Quintero's cell phone and wallet. He pointed the gun at Cruz and told her to get back into the truck.

As they drove, he told her he killed Quintero, "because he talked too much [¶] . . . [¶] [a]bout a client," and that Quintero was "selling drugs." He said he "wanted [Quintero's] money," and "they were going to buy drugs." He said "they were going half and half. [Quintero] was going to put up 1500 [and he] was going to put up another 1500." He said that he had been "planning [to kill Quintero] for a long time and that a lady had sent him." He told Cruz he planned to tie her up and rape her, and then call her family or Quintero's family to demand money in exchange for her release.

He told her to sit in the front seat with him. She sat in the middle to avoid Quintero's blood. She could see the gun in his backpack at her feet. They drove "around and around" farm fields until they were pulled over by highway patrol officers for running two stop signs.

When he stopped, Cruz threw herself out of the truck and "frantically" grabbed onto and "claw[ed]" at one of the officers. She screamed in Spanish that Tamayo-Flores had just killed her husband. The officers did not understand her, but thought she was a crime victim. They tried to take Tamayo-Flores's keys, but he drove away, pulling one officer off his feet with the truck and nearly driving over his legs. The officers instructed her to wait, and followed Tamayo-Flores in their patrol car. Cruz hid in some bushes.

Tamayo-Flores crashed the truck. He had $1,622 cash in his pocket. One of the bills had a "possible blood" stain, which matched Quintero's DNA profile. He had $31.00 in his own wallet, but Quintero's wallet and cell phone were not found. The truck's front passenger seat was soaked with Quintero's blood. A recently fired gun was in Tamayo-Flores's backpack in the truck. His DNA was on the gun and he had gunshot residue on his hands. There was a loose shell casing in the truck.

Swabs taken from under Tamayo-Flores's fingernails tested positive for blood. The forensic analyst could not determine "whose blood that was," but they contained Quintero's DNA. The analyst testified that DNA can transfer between the hands of drivers who share a steering wheel.

Officers picked up Cruz and took her to the truck, where she told a Spanish speaking officer that Tamayo-Flores murdered her husband. She was not searched. Her hands were swabbed, but not tested, for gunshot residue. She was not a source of DNA on the gun.

Cruz and another Spanish speaking officer drove around Los Angeles and Ventura County for nine hours trying to find Quintero's body without success. The body was found the

next day on some rocks below a road near Faria Beach. His pockets were turned inside out. There was blood on the road above. Shoe prints found there were consistent with the type, size, and wear of Tamayo-Flores's shoes, but could not be conclusively identified. Tire prints were consistent with the tread pattern and damage to the truck's tires, coming "close to being an identification." Seed pods from a bloody plant in the area matched seed pods on Tamayo-Flores's pant legs.

DISCUSSION

Jury Selection

Tamayo-Flores contends the People violated his state and federal constitutional rights by using six of its first seven peremptory challenges to exclude men from the jury, including a gay man. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) We reject the contention because he did not make a prima facie showing of discriminatory intent.

During voir dire, the prosecutor excused six male jurors, the sixth of whom was gay (Prospective Juror No. 3). Tamayo-Flores objected to the sixth challenge on the ground the prosecutor was discriminating based on gender and sexual orientation. The trial court denied the *Batson/Wheeler* motion, finding no prima facie showing of discrimination. It allowed the prosecutor to make a record of its reasons. The final jury included five males.

The exclusion of a single juror on a constitutionally improper basis requires reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) It is improper to exclude jurors on the basis of gender or sexual orientation. (*J.E.B. v. Alabama ex rel. T.B.*

(1994) 511 U.S. 127, 130-131 [gender]; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276 [sexual orientation].) Subject to rebuttal, we presume a peremptory challenge is properly exercised. (*People v. Salcido* (2008) 44 Cal.4th 93, 136.) The *Batson/Wheeler* inquiry consists of three steps: (1) did the defendant make out a prima facie showing that the totality of the relevant facts gives rise to a reasonable inference of discriminatory intent; (2) if so, did the prosecutor explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications; and (3) if so, has the defendant proved purposeful discrimination. (*People v. Sanchez* (2016) 63 Cal.4th 411, 433-434; *People v. Scott* (2015) 61 Cal.4th 363, 383 (*Scott*).) Although the prima facie threshold is low, the trial court correctly concluded that Tamayo-Flores did not meet it.

We independently review the record to decide whether the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*People v. Howard* (2008) 42 Cal.4th 1000, 1018; *People v. Bonilla* (2007) 41 Cal.4th 313, 342 (*Bonilla*).) We consider the entire record of voir dire as of the time the motion was made, but certain evidence may be especially relevant: whether the prosecution struck all or most of a group or used a disproportionate number of challenges against them, whether the jurors in question share only their membership and no other characteristics, whether the prosecution engaged members of the group in only desultory voir dire, and whether the defendant is a member of the excluded group or the victim is a member of the group that largely remains. (*Ibid.*) We do not consider explanations offered by the prosecutor, but we do consider nondiscriminatory reasons that

are apparent from and "clearly established" in the record that "necessarily dispel any inference of bias." (*Scott*, *supra*, 61 Cal.4th at p. 384.) We will not affirm merely because the record could have supported a nondiscriminatory challenge. (*Ibid.*)

Here, the only *Batson/Wheeler* challenge was to Prospective Juror No. 3, whose past experience with law enforcement necessarily dispels any inference of bias. A juror's past experience with police harassment is a valid basis for a peremptory challenge. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124.) Prospective Juror No. 3 said he was "wrongly arrested" in the 1970s for lewd conduct because "the chief of police [was] spending a lot of time harassing gay people." He wrote on his questionnaire that the "[p]olice behaved very badly." He said in voir dire that they "behaved abominably." He said the "system worked," and the charges were dismissed, but it "did leave a little bitter taste in my mouth for a while." He said, "you move on," but agreed with the prosecutor that "you don't forget it." He also made light of a stabbing that he witnessed, saying the victim "taunted [the perpetrator] so badly that I kinda wanted to stab him." And he served on a jury in a criminal assault and robbery trial that did not reach a verdict. (*People v. Farnam* (2002) 28 Cal.4th 107, 138 [prior service on hung jury is a "legitimate concern for the prosecution"].) That Prospective Juror No. 3 is gay and therefore a member of a cognizable group is not alone sufficient to establish a prima facie showing. (See, e.g., *People v Sattiewhite* (2014) 59 Cal.4th 446, 470 [no prima facie showing where sole African American on the venire was excused].)

That the prosecutor used six of its first seven peremptory challenges to excuse male jurors does not establish a

pattern or give rise to an inference of discrimination. The defense similarly used four of its first six peremptory challenges to excuse males. Both the defendant and the murder victim were male. The prosecutor accepted a jury that included five males and a gay woman, indicating "good faith" use of its peremptory challenges. (*People v. Garcia* (2011) 52 Cal.4th 706, 747-748.) The prosecutor engaged in more than desultory voir dire of men and nondiscriminatory reasons for its challenges are apparent. The first prospective male juror the prosecutor excused wrote in his questionnaire that he had an unpleasant experience with law enforcement when a detective "pulled his gun on" him by "mistake" and he served on a hung jury in a robbery case. He was also the victim of two home invasion robberies in which he acted much more assertively than did Cruz. The second male juror the prosecution excused recognized defense counsel from a restaurant where he worked and said his feelings about people who sold illegal drugs (like Quintero) was "not good." The third had "temporal lobe epelypsia," a medical condition he said affects his memory, requires medication, and would have required him to keep notes to remember testimony. He said he felt someone who sells drugs does not "have any type of remorse for the destruction of someone's life," among other things. The fourth said he has "a skeptical bias against law enforcement due to bad experiences in the past," which "affected [him] quite a bit" and he wrote that "abuse of power" is a major cause of crime. The fifth was young with limited ties to the community, a legitimate basis for challenge. (*People v. Lomax* (2010) 49 Cal.4th 530, 575.) The trial court did not err when it denied the *Batson/Wheeler* motion.

Evidence of Robbery

Tamayo-Flores contends there is insufficient evidence of intent to rob to support (1) the conviction for robbery, (2) the conviction for first degree murder on a felony-murder theory, and (3) the robbery-murder special circumstance. We disagree.

We review the evidence in the light most favorable to the judgment to determine whether a rational jury could have found the elements of the crimes and the allegations true beyond a reasonable doubt based on substantial evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible and of solid value. (*Id*. at p. 576.) The testimony of a single witness may be sufficient unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We presume every fact the jury could reasonably infer to support the verdict and do not reweigh evidence or reevaluate credibility. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27 (*Lindberg*).)

Tamayo-Flores argues the prosecutor did not prove the $1,600 in his pocket was Quintero's property or that he formulated the intent to rob Quintero before he killed him. Robbery requires proof of a felonious taking of another person's property from his person or immediate presence by means of force or fear. (§ 211.) If the intent to take arises after the use of force or fear, the crime is merely theft. (*People v. Morris* (1988) 46 Cal.3d 1, 19 (*Morris*), overruled on other grounds *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) First degree felony-robbery murder requires proof that the murder was committed during the perpetration (or attempted perpetration) of a robbery. (§ 189; *Lindberg*, *supra*, 45 Cal.4th at pp. 27-28.) A robbery

special circumstance finding requires proof that the intent to steal arose before or during the killing and was independent of the intent to kill. (*Ibid.*; *Morris*, *supra*, at p. 21 [special circumstance allegation of robbery is not established if the robbery is merely incidental to the killing].)

Substantial evidence supports the jury's finding that money in Tamayo-Flores's pocket was Quintero's personal property. He had $1,622 cash in his pocket when he was arrested, separate from his own wallet, and a "possible blood" stain on the cash matched Quintero's DNA profile. Cruz saw him bend over Quintero's body and take his wallet and cell phone after he shot him. Quintero's pockets had been turned inside out. The jury could rationally conclude the cash in his pocket was Quintero's and that he never planned to buy drugs that night but planned to rob and kill Quintero instead.

Substantial evidence supports the jury's finding that Tamayo-Flores formed an independent intent to take Quintero's money before he killed him. He told Cruz that he planned for a long time to kill Quintero and take his $1,500 share of the money. He said he and Quintero were each contributing $1,500 to the drug purchase and he knew Quintero would bring the money that night. He said he killed Quintero because Quintero talked too much and he wanted his money. The jury was instructed on the lesser included crime of theft and rejected it. In doing so, it rejected his theory that any taking was an afterthought. Substantial evidence supports its verdict.

Evidence of Prior Convictions

Tamayo-Flores contends evidence of his 1990 and 2000 narcotics and firearm convictions to prove intent, motive and knowledge and to corroborate Cruz's testimony was unduly

prejudicial and violated his right to due process and a fair trial. (U.S. Const., 5th & 6th Amends.; Evid. Code, § 352; Health & Saf. Code, § 11351; former § 12021, subd. (a)(1).) We disagree.

Evidence of prior crimes is admissible to prove facts other than propensity subject to the trial court's discretion to exclude unduly prejudicial evidence. (Evid. Code, §§ 1101, subd. (b), 352, 210.) We review the decision to admit the evidence for abuse of discretion. (*People v. Thomas* (2011) 52 Cal.4th 336, 354.) The court admitted records of the 1990 convictions for possessing narcotics for sale and being a felon in possession of a firearm; and the 2000 convictions for two counts of possessing narcotics for sale. A police officer testified to the facts surrounding the 2000 conviction: A traffic stop during which Tamayo-Flores was found to have 19 bindles of heroin and 22 bindles of cocaine in his pocket and $867.80 cash in his wallet. The court admitted evidence of the convictions pursuant to Evidence Code section 1101, subdivision (b) to prove intent, motive and knowledge and to corroborate Cruz's testimony that Quintero and Tamayo-Flores made a plan to buy drugs. It gave a limiting instruction.

The prosecutor argued that Tamayo-Flores "is a career drug dealer. What motivates a drug dealer is the money. . . . There is nothing that will prevent him from stopping for him to get that money. Dealing drugs, getting caught, going to prison, coming out, continuing to deal drugs. And now he's elevated his criminal sophistication."

The record supports the trial court's determination that Tamayo-Flores's prior convictions tend to prove he knew Quintero or Cruz had cash for a drug purchase, and that he knew he had a firearm in his backpack. (§§ 187, subd. (a), 190.2, subd.

(a)(17)(A), 211, former 12021, subd. (a)(1).) It also lends credence to Cruz's testimony that the murder took place during an attempted narcotics transaction. (*People v. Stern* (2003) 111 Cal.App.4th 283, 299-300.) Tamayo-Flores argues the evidence is irrelevant because he does not dispute the purpose of the trio's trip was to purchase drugs, that they were carrying money to buy drugs, or that he was armed. But the prosecution's burden of proving each element was not relieved by his tactical decision not to contest every element. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.)

The trial court acted within its discretion when it determined the evidence was not unduly prejudicial because the jury heard other evidence that Tamayo-Flores was planning to buy drugs, he was not on trial for a narcotics offense, the prior offenses were less serious than the current charges, there was no undue consumption of time, and the jury was not likely to seek to punish him for his prior acts because he was previously convicted of them. Admission of the evidence did not render the trial fundamentally unfair for the same reasons. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [due process clause protects against admission of unduly prejudicial evidence].)

Cross-examination of Cruz

Tamayo-Flores contends he was denied due process of law and his right to present a defense when the court did not allow him to impeach Cruz with evidence that she misdirected investigators and falsely accused Quintero's ex-wife of assault. (*Taylor v. Illinois* (1988) 484 U.S. 400, 409.) We disagree.

The trial court did not abuse its broad discretion to exclude the evidence because it was collateral and its admission would have resulted in undue confusion and consumption of time.

(Evid. Code, § 352; *People v. Mills* (2010) 48 Cal.4th 158, 195 (*Mills*).) Cruz told an investigator that she "thought it was [Quintero's ex-]wife," when Tamayo-Flores said that a "lady had sent him." Cruz also told an investigator that Quintero's ex-wife (Genoveva Gil) was jealous of her, punched her, pulled her hair, and tried to run a car over her several years earlier. The trial court granted the prosecutor's motion in limine to exclude the evidence, after conducting an evidentiary hearing in which Gil testified that Cruz's accusations were false. (Evid. Code, §§ 352, 402.)

Defense counsel argued the evidence was admissible for impeachment to show Cruz falsely accused someone of a crime, was prone to exaggeration and lies, and tried to misdirect the investigators. The court excluded the evidence of Cruz's opinion "whether a female ordered a hit" because it was speculative and excluded the evidence that she accused Gil of assault because it was "collateral."

The record supports the trial court's finding that the dispute between the women did "not have any real bearing" on the issues in dispute, would give rise to confusion, and would require a "trial within a trial." As it observed, Gil's denial of the assault accusations was "expected," Gil's testimony was inconsistent, the allegations were disputed, and there was no other evidence that Cruz's accusations were false. The court properly exercised control to "prevent [this] criminal trial[] from degenerating into [a] nitpicking war[] of attrition over collateral credibility issues." (*Mills*, *supra*, 48 Cal.4th at p. 195.)

Accomplice Instructions

Tamayo-Flores contends the trial court erred when it refused to give CALCRIM No. 334 to instruct the jury on

accomplice testimony concerning Cruz. Because no substantial evidence supports the instruction, there was no error.

An accomplice's testimony implicating a defendant must be viewed with caution and corroborated by other evidence that tends to connect the defendant with the crime. (§ 1111.) It is the defendant's burden to establish that the witness is an accomplice by a preponderance of the evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 967, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) If there is substantial evidence that a witness is an accomplice, the trial court must instruct on these principles. (*People v. Houston* (2012) 54 Cal.4th 1186, 1223 (*Houston*).) An accomplice is someone who is subject to prosecution for the identical offense charged, including an aider and abettor or a co-conspirator. (§ 1111.) We review de novo the trial court's refusal to instruct. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

Tamayo-Flores argues he would not have wanted Cruz to come with him and Quintero that night unless she was an accomplice. He notes that she was not searched and Quintero's wallet and cell phone were not found; that she told Tamayo-Flores she was worried Quintero's sisters would think she killed him; and that he told her, "It's your fault I am here." This evidence is insufficient to support a jury finding by a preponderance of the evidence that Cruz shares liability for any of the charged crimes: murder and robbery of Quintero, criminal threats against Cruz, kidnapping of Cruz, evading an officer, or possession of a firearm by a felon. Even if there was substantial evidence to support the instruction, its refusal was harmless under any standard because corroborating evidence overwhelmingly connected Tamayo-Flores to the crime. (§ 1111;

Houston, *supra*, 54 Cal.4th at p. 1225.) His DNA was on the gun and the victim's DNA was on the cash in his pocket.

Prosecutorial Misconduct

Tamayo-Flores contends the prosecutor committed misconduct in closing argument when he argued that Tamayo-Flores was "caught red handed," said that Quintero's blood was under Tamayo-Flores's fingernails, referred to "blood money," and said shoe prints and tire prints matched his shoes and the truck. We conclude the arguments were fair comment on the evidence.

A prosecutor commits misconduct when he or she refers to facts not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.) Prosecutorial argument that goes beyond the evidence may violate the defendant's Sixth Amendment right to confront witnesses. (*People v. Bolton* (1979) 23 Cal.3d 208, 213.) But a prosecutor has wide latitude to fairly comment on the evidence and any reasonable inferences or deductions to be drawn therefrom. (*Bonilla*, *supra*, 41 Cal.4th at pp. 336-337.)

The prosecutor prepared a slide for closing argument that declared "Defendant is caught 'Red Handed'" and drew lines from a photo of Tamayo-Flores's hands to the words "[Quintero's] Blood DNA." Another slide stated "Blood Money in Defendant's Pocket" and drew a line from a photo of the cash to the words "Quintero's Blood DNA." Defense counsel objected to the slides just before the prosecutor's rebuttal on the ground they misstated the forensic analyst's testimony. The trial court directed the prosecutor to change the slides. He removed the word "blood" so the slides stated "[Quintero's] DNA," instead of "[Quintero's] Blood DNA." But the prosecutor argued that both the fingernails and the money had Quintero's blood DNA on them.

The evidence supports the prosecutor's argument. Although the forensic analyst could not determine whether it was Quintero's blood under Tamayo-Flores's fingernails, he supported that inference when he testified that the fingernail swabs tested positive for both blood and Quintero's DNA, as the trial court determined. Although the forensic analyst could not conclude whether the stain on the money was blood, other witnesses who handled the money testified it was stained with blood.

Tamayo-Flores makes passing reference to the prosecutor's arguments about footprints and tracks. Even assuming he preserved a claim, we reject it on the merits. The evidence supported an inference that the shoe prints matched his shoes and that the tire tracks matched the tires on his truck. The expert could not conclusively identify the prints and tracks, but she said they were consistent in every physical property and impression. Both shoes and prints were the same size Reeboks with matching wear and, she said, "[i]n terms of wear, there would not be very many with identical wear." Regarding the tire prints, she said that the truck had two different sets of tires on the front and back, neither of them original, both of which matched the tire prints, including an area of significant damage in one of the truck's rear tires. There was no prosecutorial misconduct.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kevin G. DeNoce, Judge

Superior Court County of Ventura

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

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